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Ron Benson; Appellant Pro Se.
Mark L. Anderson; Eric K. Jenkins; Christensen and Jensen, PC; Alan Hennebold; Attorneys for Appellee.

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IN THE UTAH COURT OF APPEALS

RON BENSON Petitioner/Appellant, vs. LABOR COMMISSION OF UTAH and LUCENT TECHNOLOGIES, Respondent/Appellee.	Case No. 20060393

BRIEF OF APPELLEE LUCENT TECHNOLOGIES

PETITION FOR REVIEW FROM ORDERS OF THE LABOR COMMISSION OF UTAH

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JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction over this matter pursuant to Utah Code Ann. 34A-1-303(2)(b); 34A-1-303(6); 34A-2-801(7); and 34A-2-801(8)(a).

STATEMENT OF ISSUES AND STANDARDS OF REVIEW

Issue 1: Whether the medical records exhibit was sufficiently exhaustive and properly relied upon by the Administrative Law Judge and Labor Commission when denying Benson's request for permanent total disability benefits.[1]

Standard of Review:

This issue involves the challenge of an agency's interpretation and application of statute, specifically Utah Administrative Rule 602-2-1(H) which governs the form and creation of the medical records exhibit. As such, the applicable standard of review is reasonableness and rationality, also known as abuse of discretion. Ashcroft v. Industrial Commission of Utah, 855 P.2d 267, 269-70 (Utah App 1993). See also, Nucor Corp. v. State Tax Comm'n, 832 P.2d 1294, 1296 (Utah 1992); Niederhauser Ornamental & Metal Works Co. v. Tax Comm'n, 858 P.2d 1034, 1037 (Utah App. 1993).

Issue 2: Whether the Administrative Law Judge and Labor Commission abused their discretion by denying Benson's permanent total disability claim without submitting the question of causation to a medical panel.[2]

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[1] This issue encompasses issues 1, 2, 4, and 6 raised in Benson's brief.
[2] This issue encompasses issues 3 and 5 raised in Benson's brief.

Standard of Review:

This issue involves the challenge of an agency's interpretation and application of statute, specifically Utah Administrative Rule 602-2-2 which governs the utilization of medical panels. As such, the applicable standard of review is that of reasonableness and rationality, as explained above.

This issue also involves a challenge to the agency's determination that there was not a significant difference of medical opinion concerning the cause of Benson's left knee injury. This is a question of fact and the agency's factual determination should be upheld so long as it is supported by substantial evidence. Brown & Root Indus. Service v. Industrial Com'n of Utah, 947 P.2d 671, 677 (Utah 1997).

DETERMINATIVE STATUTES AND RULES

The determinative statutes and rules may be found in their entirety in Addendum A. Their citations are Utah Code Ann. § 34A-2-413(1); Utah Code Ann. § 34A-2-601; Utah Administrative Code R602-2-1(H); Utah Administrative Code R602-2-2.

STATEMENT OF THE CASE

The Appellee, Lucent Technologies ("Lucent")[3], respectfully requests that this Court uphold the decision of the Administrative Law Judge ("ALJ") and Labor Commission ("the Commission") below to deny the Appellant, Ron Benson's request for permanent total compensation benefits.

The Appellant in this case, Ron Benson ("Benson"), is a college educated former employee of Lucent Technologies. (R. Vol. 4 at 38.) He has held a wide variety of jobs with Lucent, including managerial and "desk job" positions. (R. Vol. 4. at 35-38.) This case arises due to an industrial accident in which Benson was injured while in the employ of Lucent. (R. Vol. 4 at 9.) On October 3rd 1997, Benson visited a job site as part of his duties as a field services manager. (R. Vol. 4 at 9.) While at the site, another individual accidentally pulled a large stack of industrial grade sheetrock over onto Benson, which struck his feet and legs. (R. Vol. 4 at 11; Vol. 2 at 3.)

Benson was taken to the emergency room at Alta View Hospital. (R. Vol. 4 at 13.) At the emergency room he reported that he had twisted his right foot, landed on his right knee and foot, and that a piece of sheetrock had landed on his left foot. (R. Vol. 2 at 11.) He said he had pain and swelling in the right foot, with minimal pain in the left, and denied any ankle pain, knee pain, or other injuries. (R. Vol. 2 at 11.) X-rays showed a fracture in the right foot, but no

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[3] Benson inadvertently failed to include Lucent as a defendant in the case caption. However, Lucent is made a party by operation of Utah Code Ann. §34A-2-801(8)(b)(i).

injuries to the left. (R. Vol. 2 at 12.) Benson was placed in a right foot splint, given crutches and a prescription for Lortab, told to ice and elevate his foot, and finally discharged. (R. Vol. 2 at 12.) Shortly thereafter, Benson began treating with Dr. Gordon and eventually underwent surgery on his right foot on November 5, 1997. (R. Vol. 2 at 137.) Benson's recovery from surgery went well and he was released to work on January 26, 1998. (R. Vol. 2 at 140; Vol. 4 at 16.) He was compensated for his medical treatment and temporary total disability for the entirety of his time off work. (R. Vol. 4 at 16; R. Vol. 1 at 68.)

Due to his injury, Benson's doctor restricted him to jobs involving seated positions. (R. Vol. 4 at 16.) Lucent accommodated Benson's restrictions and brought him back as a serialization manager, a position that allowed him to stay off his feet. (R. Vol. 4 at 36.) After working for nearly a year as a serialization manager, and contrary to his doctor's restrictions, Benson accepted a position as an assistant consultant. (R. Vol. 4 at 17.) The new position required much more time on his feet and aggravated Benson's injury. (R. Vol. 4 at 17.) After about five months, and at the request of Benson's doctor, Benson was made a resource scheduler, a position that was largely a desk job. (R. Vol. 4 at 19.)

Nearly three years after Benson had returned to work from his injury, and after working as a resource scheduler for over a year, Lucent offered numerous people and job positions an early retirement package. (R. Vol. 4 at 20.) Benson accepted early retirement and his last day of work was September 29, 2000. (R. Vol. 4 at 20.)

Course of Proceedings

On June 2nd, 2004, Benson filed an application for hearing with the Utah Labor Commission requesting compensation for permanent total disability arising from his October 3rd, 1997 accident. (R. Vol. 1 at 2.) During the discovery period leading up to the hearing, Benson attended an independent medical examination and functional capacity evaluation at Lucent's request. At Benson's evidentiary hearing on April 24, 2005, Benson's counsel unexpectedly made an impromptu motion to have Lucent's medical and functional capacity expert reports excluded because they were submitted to Benson's attorney later than 45 days prior to the hearing as technically required by the Labor Commission rules. (R. Vol. 4 at 3.) The ALJ granted the motion and the reports were excluded. (R. Vol. 4 at 7.)

On April 28, 2005, the ALJ released her Findings of Fact, Conclusions of Law, and Order concerning Benson's claims of permanent total impairment. (R. Vol. 1 at 67.) She found that Benson had failed to prove that he was unable to perform his former work as a scheduler for Lucent, that he had failed to prove that he was unable to perform other work that was reasonably available, and that he had failed to prove that his industrial injury was the direct cause of his permanent total disability. (R. Vol. 1 at 70-71.) Because Benson had failed to prove essential elements of his claims, the ALJ did not address any remaining issues. (R. Vol. 1 at 71.)

On May 25, 2005, Benson appealed the ALJ's decision to the Labor Commissioner. (R. Vol. 1 at 74.) In his appeal, Benson argued that the Commissioner should review four attached documents that he had not included in the medical record exhibit (hereinafter sometimes referred to as the "MRE"). (R. Vol. 1 at 74.) Lucent's memorandum in opposition to review argued that Lucent had never received the additional records and that Benson should have produced them before the MRE was compiled. (R. Vol. 1 at 81-82.) Lucent also noted that two of its own medical reports had been excluded from the MRE based on timeliness objections, and argued that it would be patently unfair to allow Benson to add previously undisclosed documents to the MRE after the hearing when Lucent had not been allowed to add records to the MRE that had been disclosed prior to the hearing. (R. Vol. 1 at 81-82.)

On January 10, 2006, the Commissioner issued an order denying Benson's motion for review. (R. Vol. 1 at 85.) The Commissioner refused to consider Benson's additional documents because they were not submitted in the timeframe required by statute. (R. Vol. 1 at 85.) In a footnote, the Commissioner added that even if the Commission were to consider the additional evidence proffered by Benson, it would not have changed the decision because the more persuasive evidence was already in the record. (R. Vol. 1 at 86.) The Commissioner adopted the ALJ's finding of fact and held that Benson was not permanently and totally disabled, and that even if he was, his industrial accident was not the cause. (R. Vol. 1 at 86.)

On March 10, 2006, Benson filed a request for reconsideration with the Commissioner. Benson's request included approximately 71 pages of additional documents that Benson asked the Commission to review. (R. Vol. 1 at 96.) Lucent argued that Benson's documents were irrelevant because they did not address the facts that the ALJ had relied upon to arrive at her ruling on the Motion for Review, and that most of the additional documents were not appropriate for inclusion into the MRE in any case. (R. Vol. 1 at 186-188.) Lucent also argued that any omissions in the MRE were created by Benson's failure to include the records in a timely fashion, and that as such they should be excluded for failure to comply with statutory guidelines. (R. Vol. 1 at 186-188.)

The Labor Commission denied Benson's request for reconsideration on March 31, 2006. This appeal followed.

SUMMARY OF ARGUMENT

This Court should find that ALJ and Labor Commission did not abuse their discretion by relying on the MRE as it existed at the time of the evidentiary hearing or by not submitting the question of causation concerning Benson's left knee injury to a medical panel.

Benson argues that there were significant omissions and errors in the MRE that lead the ALJ and Commission to err in their determination that he was not entitled to benefits for permanent total disability. However, the ALJ and Commission were correct in relying on the MRE because any omissions in the record were caused by Benson's failure to include records that were in his

possession. Furthermore, the additional documents that Benson wanted to add to the MRE did not address the primary facts that the ALJ and Commission relied upon to deny Benson's claim, thus their omission was irrelevant. Finally, Benson's contention that the MRE was flawed as a whole due to organizational errors fails because the mere misfiling of records in the MRE, without a showing that the misfilings

prejudiced Benson, is not sufficient to invalidate the MRE.

Benson also argues that the ALJ and the Labor Commission should have submitted the question of causation concerning his left knee injury to a medical panel because there were conflicting medical opinions regarding causation. However, the ALJ and the Commission were correct in not convening a medical panel because the cause of Benson's left knee injury was irrelevant due to the fact that he had failed to prove that he was totally disabled. Additionally, the ALJ did not abuse her discretion by failing to analyze all of the issues surrounding Benson's claim for benefits once she determined that his claim for permanent total disability benefits had failed. Finally, there were no significant conflicts of medical opinion concerning the cause of Benson's left knee injury, and even if there had been, such conflicts were irrelevant to the issue of permanent and total disability.

ARGUMENT

This Court should find that the Labor Commission did not abuse its discretion by relying on the medical records exhibit as it existed at the time of the evidentiary hearing, and that it did not abuse its discretion by not convening a medical panel to determine the cause of Benson's left knee injury. Before addressing the main points raised in Benson's argument, Lucent would like to address two issues related to difficulties that have arisen in interpreting and answering Benson's brief.

First, where a brief's overall analysis is so lacking that it shifts the burden of research and argument to the Court, the Court need not even consider it. Morgan v. Labor Com'n, 2003 Utah App 293. While Lucent appreciates the difficulties faced by a pro se appellant, Benson's brief is devoid of almost any relevant legal analysis. His arguments are largely bald assertions that lack a foundation in law or fact, and his brief is structured in such a way that it requires the reader to guess at the topics he addresses and the arguments he makes. Lucent has spent considerable time and effort extracting and organizing the seemingly random collection of arguments contained in Benson's brief. It is not the Court's responsibility to guess at the arguments and structure of a brief, and as such, it would seem entirely appropriate for this Court to not even consider the merits of Benson's arguments and deny his appeal as inadequately briefed. Id.

Second, the issues addressed by Lucent in this brief represent a good faith effort to distill and organize the arguments raised by Benson in his appeal. It is

Lucent's understanding that Benson has not directly challenged any of the Commission's findings of fact other than its finding that there were not significant conflicting opinions concerning the cause of Benson's left knee injury. Benson's arguments focus largely on alleged deficiencies in the medical records exhibit and the Commission's failure to completely review the MRE. To the extent that this Court finds that Benson has challenged findings of fact, it must uphold the Commission's findings so long as they are supported by substantial evidence. Kennecott Corp. v. State Tax Comm'n, 858 P.2d 1381, 1385 (Utah 1993). Lucent contends that the record as a whole contains substantial evidence sufficient to support all of the Commission's factual findings.

Additionally, Benson failed to marshal evidence as required to challenge a finding of fact. A party challenging a lower court's findings of fact has the burden of establishing that those findings are not supported by the evidence. Cambelt Int' Corp. v. Dalton, 745 P.2d 1239, 1242 (Utah 1987). To successfully challenge a trial court's findings of fact on appeal, an appellant must list all the evidence supporting the findings and then show that the evidence is inadequate to sustain the findings, even when viewed in the light most favorable to the court below. Valcarce v. Fitzgerald, 961 P.2d 305, 312 (Utah 1998). "If the appellant fails to marshal the evidence, the appellate court assumes that the record supports the findings of the trial court." Saunders v. Sharp, 806 P.2d 198, 199 (Utah 1991). In this case, Benson has not even attempted to marshal the evidence. Therefore, to the extent that Benson challenges the Labor Commission's factual findings, such

challenge must be rejected, and this Court should hold that the record supports the findings of the Labor Commission below.

POINT 1

THE LABOR COMMISSION DID NOT ABUSE ITS DISCRETION BY RELYING ON THE MEDICAL RECORDS EXHIBIT AS IT EXISTED AT THE TIME OF THE HEARING.

A. The Labor Commission Was Correct in Refusing to Review Additional Documents Proffered by Benson After the Evidentiary Hearing Because Any Omissions in the Medical Records Exhibit Were the Result of Benson's Own Failure to Include Documents That Were in His Possession.

The Commission's reliance on the medical records exhibit was not an abuse of discretion because any omissions in the record were caused by Benson's own failure to include documents he had in his possession long before the evidentiary hearing. The creation of the MRE is governed by Utah Administrative Code Rule R602-2-1(H), which states:

> 1. The parties are expected to exchange medical records during the discovery period
>
> 2. Petitioner shall submit all relevant medical records contained in his/her possession to the respondent for the preparation of a joint medical records exhibit at least twenty (20) working days prior to the scheduled hearing.
>
> 3. The respondent shall prepare a joint medical record exhibit containing all relevant medical records. The medical record exhibit shall include all relevant treatment records that tend to prove or disprove a fact in issue. Hospital nurses' notes, duplicate materials, and other non-relevant materials need not be included in the medical records exhibit.
>
> 4. The medical records shall be indexed, paginated, arranged by medical care provider in chronological order and bound.

5. The medical record exhibit prepared by the respondent shall be delivered to the Division and the petitioner or petitioner's counsel at least ten (10) days prior to the hearing. Late-filed medical records may or may not be admitted at the discretion of the administrative law judge by stipulation or for good cause shown.

Under this statutory scheme, the petitioner in a workers' compensation case has the responsibility to provide the respondent with all of the medical records that the petitioner wants included in the record. The respondent then compiles the MRE and delivers it to the petitioner at least ten days prior to the hearing; ample time for the petitioner to review the record for accuracy and completeness. If any records have been omitted, the petitioner may request that they be added to the record. This is generally accomplished between the parties previous to the hearing, although it is not unusual for an ALJ to allow previously disclosed records into the MRE at the hearing. Additional records may be admitted at the discretion of the ALJ if good cause is shown.

In this matter, Benson has not shown good cause to allow additional records to be admitted. He provided a number of records to Lucent previous to the evidentiary hearing, all of which were incorporated into the MRE. The MRE was delivered for inspection to Benson's attorney before the hearing. Benson did not request that additional records be added to the MRE either before or during the hearing. Instead, Benson signaled that he expected strict adherence to the Administrative Rules by moving to have both of Lucent's expert reports excluded because Lucent had not served its pretrial disclosures a full 45 days previous to the

hearing as technically required by Rule 602-2-1(I)(3). Benson's motion was successful and Lucent's expert reports were excluded from the MRE.

In his motion for review, Benson attempted to submit four pages of additional documents for review, but did not explain why the additional documents had not been included in the MRE prior to the hearing. (R. Vol. 1 at 74.) In Benson's request for reconsideration, in which he attempted to submit even more new documents, he stated several times that his former attorney had not given him the opportunity to review the MRE before his hearing. (R. Vol. 1 at 105.) He seems to imply that his attorney was at fault for not including the additional documents. (R. Vol. 1 at 105, 109.) Finally, in his appellate brief, Benson claims that he gave the additional documents to his attorney well in advance of the creation of the MRE and suggests that his attorney did not forward them to Lucent for inclusion in the MRE. (Appellant's Brief at 5.) Benson also suggests that Allen may have given the additional documents, which were apparently derived from Benson's request for Social Security benefits, to Lucent's attorney, but that Lucent instead included documents that it had obtained directly from the Social Security Administration.[4] (Appellant's Brief at 5.)

No matter what explanation is forwarded by Benson, the only relevant fact is that Benson apparently failed to review the MRE prior to the evidentiary

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[4] Lucent does not have a clear understanding why Benson believes that the documents he obtained from his doctor and submitted to the Social Security Administration are different from those that Lucent obtained directly from the Social Security Administration. Lucent is not aware of any facts that would suggest the documents were different.

hearing. If Benson feels that this is the fault of his attorney, he should raise that issue with him. Clearly, Lucent fulfilled its statutory duty to compile the MRE and then submitted it to Benson for his inspection. Lucent cannot be expected to include documents that it had not received, nor does Lucent or the Commission have a duty to ensure that Benson reviewed the MRE before the hearing. The Commissioner noted that the additional documents Benson proffered were prepared well in advance of the evidentiary hearing and that he had failed to explain why he did not include them in the MRE. (R. Vol. 1 at 86.) As such, the Commission declined to consider them because they had not been submitted in accordance to the statutory requirements. (R. Vol. 1 at 85, 86.) Finally, it would be patently unfair to allow Benson to include additional documents in the MRE after he had successfully petitioned the ALJ to exclude Lucent's expert reports for violating similar technical timing requirements. (R. Vol. 4 at 7.) For these reasons, Lucent asks this Court to find that the Commission did not abuse its discretion by not reviewing additional documentation proffered by Benson after the evidentiary hearing.

B. The Medical Records Exhibit Did Not Include Any Significant Omissions.

As stated previously, the Labor Commission acted properly in refusing Benson's request to supplement the MRE. However, even if this decision were improper, it would be immaterial to the denial of Benson's permanent total disability claim because the MRE did not include any significant omissions.

Benson criticizes the MRE for being incomplete and it appears that the focus of his argument is the 58 pages of documents he attached to his Request for Reconsideration to the Commissioner. (R. Vol. 1 at 96.) Many of the documents in question are not appropriate for the MRE, given that they are correspondence, bills, and other documents that are not "medical records."

Furthermore, the additional documents do not change the basic facts that are already set forth in the MRE. The "omitted" documents largely reiterate the undisputed fact that Benson suffered a serious workplace injury. Some of the documents reflect Dr. Watson's opinion that Benson's depression and anxiety symptoms were caused by the industrial accident. However, these same points were already made in the records that were included in the medical records exhibit (R. Vol. 3 at 392, 394.) Additionally, Dr. Watson's opinion that Benson's alleged depression, anxiety, chronic pain, and sleep problems are related to his industrial accident is already presented, although admittedly misfiled, in the MRE. (R. Vol. 3 at 469.) Thus, in this regard, the records Benson seeks to add are merely redundant, as noted by the Commissioner in his denial of the request for reconsideration.

Moreover, the additional records do not address the reasons that the ALJ and Commission cited when denying Benson's request for benefits. The ALJ held that Benson had not proved that he was unable to perform his former work as a scheduler, that he had not proved that he was unable to perform other work reasonably available, and that he had not proved that his industrial accident was

the direct cause of his permanent total disability. These holdings were based largely on the fact that he was able to perform his job duties for several years before leaving Lucent, that he only left Lucent once he was offered early retirement, and that he has the education and experience to perform sedentary office work. (R. Vol. 1 at 70-71.) The Commission agreed with the ALJ and added that "[e]ven if the Commission were to consider the evidence proffered by Mr. Benson, such evidence would not change the Commission's decision. The more persuasive evidence already in the record convinces the Commission that Mr. Benson is not permanently and totally disabled within the meaning of the Act." (R. Vol. 1 at 86.)

None of Benson's additional documents dispute or negate the facts that the ALJ and the Commission relied upon in denying Benson's request for permanent total disability. Thus, their omission from the MRE was irrelevant and insignificant. Because the omissions in the MRE are not critical, this Court should find that the ALJ and the Commission did not abuse their discretion by relying on the MRE as it existed at the time of the evidentiary hearing to deny Benson's request for permanent total impairment compensation.

C. The Commission Did Not Abuse its Discretion By Relying on the Medical Record Exhibit Despite its Organizational Problems.

The Commission's reliance on the MRE was not an abuse of discretion despite the record's organizational problems. Benson has exhaustively documented every misfiling in the MRE, most of which relate to a group of

documents that were inadvertently filed under tab eight, which was intended for records from the University of Utah Pain Management Center. However, he has not demonstrated that these errors affected how the Labor Commission decided his case.

Benson had ample opportunity to review the MRE prior to his evidentiary hearing. If he had concerns about the state of the MRE's organization, he should have voiced them prior to the hearing. Instead, his silence on the subject acted as an implicit ratification of the MRE, misfilings and all.

Benson has not cited any law suggesting that the misfilings in an MRE in and of themselves invalidate the entire record. If that were the case, many MREs would likely be deemed invalid. More importantly, he has not cited any evidence indicating that the ALJ or the Commission had any difficulty navigating the MRE. The unintentional misfiling of documents in the MRE is similar to an "Exhibit A" attached to a motion being accidentally identified as "Exhibit B" in the argument portion of the motion, or similar minor lapses and missteps that occur all the time in litigation documents notwithstanding exhaustive proof reading. Without evidence that he was somehow prejudiced by the misfilings, or that the Commission missed important evidence due to the misfilings, they cannot be viewed as anything more serious than unfortunate but inconsequential mistakes that did not affect the outcome of the case.

The mere fact that organizational errors exist in the MRE is not sufficient to invalidate the exhibit, and without evidence of a negative effect on Benson's claim,

there is no reason to assume that the Commission abused its discretion by relying on the MRE despite its imperfections. This Court should find that the Commission and ALJ did not abuse their discretion by relying on the MRE notwithstanding its misfilings because Benson had the opportunity to review the MRE before it was submitted at the evidentiary hearing, there is no evidence that Benson was prejudiced due to the misfilings, and there is no evidence that the misfilings effected the Commission's ability to find the important records upon which its decisions were based.

D. The Record Shows That the Administrative Law Judge and Labor Commission Reviewed and Understood the Medical Record.

Throughout his brief, Benson alleges that the ALJ and the Commission did not review the entire MRE, misunderstood the MRE, or purposefully ignored portions of the MRE so that they could rule against his claim. These unfounded allegations are not supported by the record.

Benson has not cited a single piece of evidence that suggesting that the ALJ or the Commission failed to properly review the evidence. Instead, his brief cites, ad nauseum, to pages of evidence that were submitted to the ALJ in the MRE. His circular reasoning appears to be that if the ALJ and the Commission had seen this evidence they could not have possibly denied his request for benefits, so because they denied his request for benefits they must not have reviewed the cited evidence. However, in their denial of Benson's request for review, the Commissioner stated that he denied Benson's claims because "the more persuasive

evidence already in the record convinces the Commission that Mr. Benson is not permanently and totally disabled." (R. Vol. 1 at 86.) Despite Benson's incredulity that the Commission could arrive at such a conclusion in the face of what he views as irrefutable evidence, it is clear that the issue is not that the Commission did not review Benson's evidence, but rather that it found other evidence to be more persuasive.

The decisions released by the ALJ and the Commission in this case make it clear that Benson's evidence was carefully reviewed. In her decision, the ALJ addressed all of the ailments that Benson claims to have made him permanently and totally disabled, including his right foot and leg, left knee, insomnia, depression, stress, anxiety, and restless leg syndrome. (R. Vol. 1 at 68.) She also addressed other considerations, such as Dr. Barbuto's determination that Benson had "obvious pain behaviors of a psychosocial type" accompanied by "frequent wincing and melodrama in his movements." (R. Vol. 1 at 69.) Further, the ALJ noted that Benson had worked for nearly three years after the accident and continued to be qualified and able to hold an office job involving sedentary work responsibilities. (R. Vol. 1 at 70-71.)

There is no question that one of the primary duties of the ALJ is to weigh the evidence and assess its credibility. Martin v. La-Z-Boy, Inc., 2004 UT App 31. The fact that the ALJ arrived at a decision that Benson does not agree with does not indicate that his evidence was not reviewed. Rather, it merely indicates that the evidence was weighed and that the judge found the evidence opposing

Benson's claim to be more credible than that supporting his claim. Based on Benson's total lack of evidence supporting his argument that the ALJ and Commission failed to review the MRE in its entirety, and the comprehensive review of the evidence found in the ALJ's and Commission's findings of fact, Lucent requests that this Court rule that the Commission did not abuse its discretion in reviewing the MRE, and interpreting the evidence therein.

POINT 2

THE ADMINSTRATIVE LAW JUDGE AND LABOR COMMISSION DID NOT ABUSE THEIR DISCRETION BY NOT SUBMITING THE CASE TO A MEDICAL PANEL.

A. The Labor Commission Did Not Need to Submit the Case to a Medical Panel Because Benson Failed to Prove That He was Permanently and Totally Disabled.

The entirety of the argument portion of Benson's brief deals with his contentions that the ALJ and Labor Commission erred in their determination that Benson's permanent total disability was not caused by his industrial accident. He believes this error was either caused by missing/overlooked documents in the MRE or the ALJ's failure to submit the case to a medical panel to determine causation. However, Benson's zeal in arguing causation is misplaced because he failed to first prove that he has been permanently and totally disabled.

To be successful in a claim for permanent total impairment, the petitioner must prove three things. First, he must show that he "sustained a significant impairment or combination of impairments as a result of the industrial accident or occupational disease that gives rise to the permanent total disability entitlement."

Second, he must show that "he is permanently totally disabled." Finally, the petitioner must show that "the industrial accident or occupational disease was the direct cause of the employee's permanent total disability." Utah Code Ann. § 34A-2-413(1)(b).

The ALJ's findings of fact, which were later adopted by the Labor Commission, specifically stated that Benson had failed to prove that his injuries prevented him from performing his former job at Lucent or other readily available work for which he was qualified. (R. Vol. 1 at 70-71). In other words, Benson failed to satisfy his burden of proof that he was permanently and totally disabled. Without a finding of total impairment, there is no need to consider the issue of causation. In fact, it is impossible to establish that total impairment was caused by a particular accident when total impairment has not been proven. Because it is impossible to establish the causation of an injury that has not been proven, the ALJ and Commission did not abuse their discretion by failing to submit the question of causation to a medical panel.

B. The Administrative Law Judge Did Not Violate Benson's Rights by Failing to Review Additional Aspects of Benson's Case After She Had Determined That Benson Had Failed to Establish Essential Elements of His Claim.

Benson asserts that the ALJ violated his rights by stating in her ruling that "[b]ecause the petitioner has failed to meet his burden of proving these aspects of his case, the remaining issues related to the claim need not be addressed." Appellants Brief at 9. Tellingly, Benson does not provide any reasons or support

as to why he believes this is the case. In actuality, the ALJ did not need to continue her analysis once she determined that Benson's claim had not been proven.

In her findings of fact, the ALJ found that Benson had failed to prove that he was permanently and totally disabled and that he had failed to prove that his industrial accident had caused his permanent disability. (R. Vol. 1 at 70-71.) Such showings are required in order to prevail in a claim for permanent total disability. Utah Code Ann. § 34A-2-413(1)(b). Without such showings, Benson's claim could not be succeed. At the point that Benson's claim failed, further analysis of other issues related to the claim was superfluous. Therefore, once the ALJ had determined that Benson was not entitled to permanent total disability, she did not violate Benson's rights by refusing to examine any additional issues that may have been related to his claim.

C. There Were No Significant Conflicting Opinions Concerning the Causation of Benson's Disabilities.

Benson argues that the ALJ and Commission abused their discretion by not submitting the question of causation to a medical panel. Specifically, Benson argues that the question of whether his left knee injury was caused by his industrial accident should have been submitted to a panel. [5] As noted supra, the

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[5] Benson's issue number three asks generally whether the judge erred by "not convening a medical panel when there is a conflict in medical opinions." However, it appears that this issue is specifically related to the causation of his left knee injury. On page 8 of his brief, Benson cites Utah Administrative Code Rule 602-2-2(A)(1), which deals specifically with the question of causation. On the

issue of causation is irrelevant unless total impairment has been established. Assuming for the sake of argument that Benson had established total impairment, the ALJ still did not abuse its discretion by ruling on the question of causation without the assistance of a medical panel.

Utah Code Ann. §34A-2-601 gives the Labor Commission discretion whether to appoint a medical panel. However, the Commission has also adopted Administrative Rule R602-2-2, which states that a medical panel must be utilized if there are significant medical issues demonstrated by conflicting medical opinions concerning important topics such as those "related to causation of the injury." The Utah Supreme Court has summarized this rule (then numbered as R568-1-9) and explained the standard of review concerning its application as follows:

> This rule requires the ALJ to submit the case to a medical panel when "[one or more significant medical issues may be involved." A significant medical issue must generally be shown by conflicting medical reports. Thus, referral to a medical panel is mandatory only where there is a medical controversy as evidenced through conflicting medical reports. Whether there are conflicting medical reports is a question of fact. We must uphold the Commission's factual findings if such findings are supported by substantial evidence based upon the record as a while. When reviewing the Commission's application of its own rules, this Court will not disturb the agency's interpretation or application of one of the

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same page, Benson cites the ALJ's statement in her Findings of Fact that "Dr. Gordon disagreed with Dr. Zeluff as to the cause of the petitioner's left knee condition" as the basis of his contention that the case should have been referred to a medical panel. Point II of his argument section, which is where he addresses his contention that there was a conflicting medical opinion regarding causation, deals entirely with the opinions of doctors Gordon and Zeluff concerning the cause of his left knee injury.

> agency's rules unless its determination exceeds the bounds of reasonableness and rationality. Thus, we will overturn the agency's interpretation only if that interpretation is an abuse of discretion.

Brown, 947 P.2d at 677 (citations omitted).

Benson's entire argument concerning the necessity of a medical panel arises from a paragraph in the ALJ's findings of fact in which she states that "Dr. Gordon disagreed with Dr. Zeluff as to the cause of the petitioner's left knee condition." (R. Vol. 1 at 69). It relies entirely on notes Dr. Gordon took concerning an office visit Benson made in July of 2000. The disagreement concerning the cause of Benson's left knee condition is not significant, as required by R602-2-2, nor is it based on opinion or medical reports.

Dr. Zeluff, the Petitioner's own medical expert, performed an examination and submitted a medical report detailing his opinions concerning Benson's injuries. He clearly stated that he did not believe that Benson's left knee injury was related to his industrial accident. (R. Vol. 3 at 501, 503.)

On the other hand, the document upon which Benson relies to claim a significant difference of opinion concerning causation is a brief memo in Dr. Gordon's records detailing Benson's office visit on July 27, 2000. The doctor's note states that "[a]t this point, it appears that he has an irritation of the left knee probably aggravated from the abnormal gait from his right foot injury. Would recommend getting an MRI of the left knee to rule out a lateral meniscus tear." (R. Vol. 2 at 157.) This document was clearly not meant as a statement of Dr. Gordon's opinion concerning the cause of Benson's left knee injury, nor was it a

medical report. Rather, it is a brief memo meant for Benson's file to remind Dr. Gordon of what was discussed during Benson's visit. His statement that "[a]t this point, it appears that he has an irritation of the left knee probably aggravated...from the right foot injury" is not language that suggests an opinion concerning causation, but rather appears to be a vague hypothesis that he intended to test with a recommended diagnostic procedure.

Given the nature of the document and the extremely vague language that related Dr. Gordon's "opinion," the ALJ acted both reasonably and rationally by determining that Dr. Gordon's office note did not create a significant conflicting opinion in the face of Dr. Zeluff's clearly stated opinion contained in his medical report. As such, the ALJ did not abuse her discretion by ruling on the question of causation without the assistance of a medical panel.

D. Even if the Opinions of Doctors Zeluff and Gordon Constitute Conflicting Medical Opinions with Regard to the Cause of Benson's Left Knee Injury, Such Conflict is Irrelevant to Benson's Claims.

In order to prove permanent total disability, the petitioner must show that the industrial injury caused total disability. Utah Code Ann. § 34A-2-413(1)(b). If the petitioner cannot show that the injury caused total disability, the claim for permanent disability fails and the cause of the injury, whether medically disputed or not, is simply irrelevant.

Benson's focus on the Commission's failure to utilize a medical panel to determine the cause of his left knee injury is misplaced, given that Benson himself has acknowledged that his left knee injury was not the cause of his alleged total

disability. At the evidentiary hearing, Benson testified that he is disabled mainly due to sleep problems caused by "nervous legs" and cognitive difficulties related to an assortment of medications he takes, not because of his knee injury. (R. Vol. 4 at 26, 42.) Benson has not proved that his sleep problems or cognitive difficulties are related in any way to his left knee injury.

Benson states that his sleep problems are caused by "nervous legs," a condition that makes both of his legs "flip uncontrollably" at night. (R. Vol. 4 at 26.) He has made various vague statements suggesting that his nervous legs are related to his left knee injury, but has not presented any medical evidence demonstrating a connection between his twitching legs and his left knee injury. Additionally, he has not shown how or why his left knee injury could have caused nervous leg syndrome in both of his legs.

Similarly, Benson testified that he has been on "dozens and dozens" of different medications. (R. Vol. 4 at 28.) However, he has not specified which medications he believes caused his cognitive problems, nor has he submitted any medical evidence to prove that his cognitive difficulties are a result of any of the dozens of medications he has been on, or that any such medications were necessitated by his left knee injury.

In the end, the cause of Benson's left knee injury is totally irrelevant because he has not shown that the injury stopped him from performing his job duties at Lucent. The job in question is a "white collar" desk job that would be well suited for any person who lacked full mobility, including individuals using

crutches or a wheelchair. Simply put, a fully functional left knee was not a requirement for his job.

In summary, Benson has failed to prove that his left knee injury kept him from performing his duties at Lucent, or that the conditions he believes prevented him from performing his duties, his sleep problems and cognitive difficulties, were related in any way to his left knee injury. As such, his left knee injury is irrelevant to his permanent total disability claim because it did not cause a total disability. Where the injury is irrelevant, the question of causation, whether medically disputed or not, need not be determined by a medical panel. Accordingly, Benson's insistence that the ALJ should have convened a medical panel is without basis.

CONCLUSION

For the foregoing reasons, Lucent asks this Court to affirm the decision of the Labor Commission. Specifically, this Court should find that the ALJ and the Labor Commission did not abuse their discretion by relying on the medical records exhibit as it existed at the time of the evidentiary hearing, and by not convening a medical panel to examine the causation of Benson's left knee symptoms.

DATED this 8th day of January, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing Brief of Appellee Lucent Technologies was mailed first class, postage prepaid, this 8th day of January, 2007, to the following:

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ADDENDUM A

DETERMANITIVE STATUTES AND RULES

Utah Code Ann. § 34A-2-413(1):

(1)(a) In cases of permanent total disability resulting from an industrial accident or occupational disease, the employee shall receive compensation as outlined in this section.

(b) To establish entitlement to permanent total disability compensation, the employee must prove by a preponderance of evidence that:

(i) the employee sustained a significant impairment or combination of impairments as a result of the industrial accident or occupational disease that gives rise to the permanent total disability entitlement;

(ii) the employee is permanently totally disabled; and

(iii) the industrial accident or occupational disease was the direct cause of the employee's permanent total disability.

(c) To establish that an employee is permanently totally disabled the employee must prove by a preponderance of the evidence that:

(i) the employee is not gainfully employed;

(ii) the employee has an impairment or combination of impairments that limit the employee's ability to do basic work activities;

(iii) the industrial or occupationally caused impairment or combination of impairments prevent the employee from performing the essential functions of the work activities for which the employee has been qualified until the time of the industrial accident or occupational disease that is the basis for the employee's permanent total disability claim; and

(iv) the employee cannot perform other work reasonably available, taking into consideration the employee's:

(A) age;

(B) education;

(C) past work experience;

(D) medical capacity; and

(E) residual functional capacity.

(d) Evidence of an employee's entitlement to disability benefits other than those provided under this chapter and Chapter 3, Utah Occupational Disease Act, if relevant:

(i) may be presented to the commission;

(ii) is not binding; and

(iii) creates no presumption of an entitlement under this chapter and Chapter 3, Utah Occupational Disease Act.

Utah Code Ann. § 34A-2-601:

(1)(a)The Division of Adjudication may refer the medical aspects of a case described in this Subsection (1)(a) to a medical panel appointed by an administrative law judge

(i) upon the filing of a claim for compensation arising out of and in the course of employment for:

(A) disability by accident; or

(B) death by accident; and

(ii) if the employer or the employer's insurance carrier denies liability.

(b) An administrative law judge may appoint a medical panel appointed by an administrative law judge upon the filing of a claim for compensation based upon disability or death due to an occupational disease.

(c) A medical panel appointed under this section shall consist of one or more physicians specializing in the treatment of the disease or condition involved in the claim.

(d) As an alternative method of obtaining an impartial medical evaluation of the medical aspects of a controverted case, the division may employ a medical director or one or more medical consultants:

(i) on a full-time or part-time basis; and

(ii) for the purpose of:

(A) evaluating the medical evidence; and

(B) advising an administrative law judge with respect to the administrative law judge's ultimate fact-finding responsibility.

(e) If all parties agree to the use of a medical director or one or more medical consultants, the medical director or one or more medical consultants shall be allowed to function in the same manner and under the same procedures as required of a medical panel.

(2)(a) A medical panel, medical director, or medical consultant may do the following to the extent the medical panel, medical director, or medical consultant determines that it is necessary or desirable:

(i) conduct a study;

(ii) take an x-ray;

(iii) perform a test; or

(iv) if authorized by an administrative law judge, conduct a post-mortem examination.

(b) A medical panel, medical director, or medical consultant shall make:

(i) a report in writing to the administrative law judge in a form prescribed by the Division of Adjudication; and

(ii) additional findings as the administrative law judge may require.

(c) In an occupational disease case, in addition to the requirements of Subsection (2)(b), a medical panel, medical director, or medical consultant shall certify to the administrative law judge:

(i) the extent, if any, of the disability of the claimant from performing work for remuneration or profit;

(ii) whether the sole cause of the disability or death, in the opinion of the medical panel, medical director, or medical consultant results from the occupational disease; and

(iii)(A) whether any other causes have aggravated, prolonged, accelerated, or in any way contributed to the disability or death; and

(B) if another cause has contributed to the disability or death, the extent in percentage to which the other cause has contributed to the disability or death.

(d)(i) The administrative law judge shall promptly distribute full copies of a report submitted to the administrative law judge under this Subsection (2) by certified mail with return receipt requested to:

(A) the applicant;

(B) the employer; and

(C) the employer's insurance carrier.

(ii) Within 15 days after the report described in Subsection (2)(d)(i) is deposited in the United States post office, the following may file with the administrative law judge written objections to the report:

(A) the applicant;

(B) the employer; or

(C) the employer's insurance carrier.

(iii) If no written objections are filed within the period described in Subsection (2)(d)(ii), the report is considered admitted in evidence.

(e)(i) The administrative law judge may base the administrative law judge's finding and decision on the report of:

(A) a medical panel;

(B) the medical director; or

(C) one or more medical consultants.

(ii) Notwithstanding Subsection (2)(e)(i), an administrative law judge is not bound by a report described in Subsection (2)(e)(i) if other substantial conflicting evidence in the case supports a contrary finding.

(f)(i) If an objection to a report is filed under Subsection (2)(d), the administrative law judge may set the case for hearing to determine the facts and issues involved.

(ii) At a hearing held pursuant to this Subsection (2)(f), any party may request the administrative law judge to have any of the following present at the hearing for examination and cross-examination:

(A) the chair of the medical panel;

(B) the medical director; or

(C) the one or more medical consultants.

(iii) For good cause shown, the administrative law judge may order the following to be present at the hearing for examination and cross-examination:

(A) a member of a medical panel, with or without the chair of the medical panel;

(B) the medical director; or

(C) a medical consultant.

(g)(i) The written report of a medical panel, medical director, or one or more medical consultants may be received as an exhibit at the hearing described in Subsection (2)(f).

(ii) Notwithstanding Subsection (2)(g)(i), a report received as an exhibit under Subsection (2)(g)(i) may not be considered as evidence in the case except as far as the report is sustained by the testimony admitted.

(h) For any claim referred under Subsection (1) to a medical panel, medical director, or medical consultant before July 1, 1997, the commission shall pay out of the Employers' Reinsurance Fund established in Section 34A-2-702:

(i) expenses of the study and report of the medical panel, medical director, or medical consultant; and

(ii) the expenses of the medical panel's, medical director's, or medical consultant's appearance before the administrative law judge.

(i)(i) For any claim referred under Subsection (1) to a medical panel, medical director, or medical consultant on or after July 1, 1997, the commission shall pay out of the Uninsured Employers' Fund established in Section 34A-2-704 the expenses of:

(A) the study and report of the medical panel, medical director, or medical consultant; and

(B) the medical panel's, medical director's, or medical consultant's appearance before the administrative law judge.

(ii) Notwithstanding Section 34A-2-704, the expenses described in Subsection (2)(i)(i) shall be paid from the Uninsured Employers' Fund whether or not the employment relationship during which the industrial accident or occupational disease occurred is localized in Utah as described in Subsection 34A-2-704(20).

Utah Administrative Code R602-2-1(H):

H. Medical Records Exhibit.

1. The parties are expected to exchange medical records during the discovery period.

2. Petitioner shall submit all relevant medical records contained in his/her possession to the respondent for the preparation of a joint medical records exhibit at least twenty (20) working days prior to the scheduled hearing.

3. The respondent shall prepare a joint medical record exhibit containing all relevant medical records. The medical record exhibit shall include all relevant treatment records that tend to prove or disprove a fact in issue. Hospital nurses' notes, duplicate materials, and other non-relevant materials need not be included in the medical record exhibit.

4. The medical records shall be indexed, paginated, arranged by medical care provider in chronological order and bound.

5. The medical record exhibit prepared by the respondent shall be delivered to the Division and the petitioner or petitioner's counsel at least ten (10) working days prior to the hearing. Late-filed medical records may or may not be admitted at the discretion of the administrative law judge by stipulation or for good cause shown.

6. The administrative law judge may require the respondent to submit an additional copy of the joint medical record exhibit in cases referred to a medical panel.

7. The petitioner is responsible to obtain radiographs and diagnostic films for review by the medical panel. The administrative law judge shall issue subpoenas where necessary to obtain radiology films.

Utah Administrative Code R602-2-2:

Pursuant to Section 34A-2-601, the Commission adopts the following guidelines in determining the necessity of submitting a case to a medical panel:

A. A panel will be utilized by the Administrative Law Judge where one or more significant medical issues may be involved. Generally a significant medical issue must be shown by conflicting medical reports. Significant medical issues are involved when there are:

1. Conflicting medical opinions related to causation of the injury or disease;

2. Conflicting medical reports of permanent physical impairment which vary more than 5% of the whole person,

3. Conflicting medical opinions as to the temporary total cutoff date which vary more than 90 days;

4. Conflicting medical opinions related to a claim of permanent total disability, and/or

5. Medical expenses in controversy amounting to more than $10,000.

B. A hearing on objections to the panel report may be scheduled if there is a proffer of conflicting medical testimony showing a need to clarify the medical panel report. Where there is a proffer of new written conflicting medical evidence, the Administrative Law Judge may, in lieu of a hearing, re-submit the new evidence to the panel for consideration and clarification.

C. The Administrative Law Judge may authorize an injured worker to be examined by another physician for the purpose of obtaining a further medical examination or evaluation pertaining to the medical issues involved, and to obtain a report addressing these medical issues in all cases where:

1. The treating physician has failed or refused to give an impairment rating, and/or

2. A substantial injustice may occur without such further evaluation.

D. Any expenses of the study and report of a medical panel or medical consultant and of their appearance at a hearing, as well as any expenses for further medical examination or evaluation, as directed by the Administrative Law Judge, shall be paid from the Uninsured Employers' Fund, as directed by Section 34A-2-601.